INTRODUCTION

The Competition Act, 2002 (‘Act’) was enacted with the objective to establish a Commission to “prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade”, as has been laid down in the preamble of the act.

There are 3 limbs that the act mainly deals with:

1) Anti-Competitive Agreements
2) Abuse of Dominant Position
3) Regulation of Combinations

This paper is going to focus on the first limb, that is, Anti-Competitive Agreements in detail. The anti-competitive agreements are those agreements, which “cause or are likely to cause an appreciable adverse effect on competition in markets” in India. The primary object of the act as given in the Preamble is to prohibit practices that affect competition. Agreements like the ones for price fixing, supply restriction, market allocation etc. are some examples of the agreements that affect competition in the market.

The law prohibits agreements and practices that are anti-competitive as contained in Section 3 of the act. Section 3(1) discusses agreements in production/supply/distribution etc. of goods or services that “causes or is likely to cause an appreciable adverse effect on competition” within India. Section 3(2) declares such agreements as void. Section 3(3) prohibits horizontal anti-competitive agreements, which deal in providing identical or related goods or services, acting in concert or such
action by cartel. Section 3(4) deals with vertical restraints imposed through agreements among enterprises operating at different stages of production or supply. Section 3(5) provides limited exemption to holders of Intellectual Property Rights with regard to provisions of Section 3. The main intention behind incorporating the provisions relating to Anti-Competitive Agreements in the act is to promote competition for protecting interests and welfare of consumers.

SECTION 3: ANTI – COMPETITIVE AGREEMENTS

Anti-Competitive Agreements are dealt under Section 3 of the Competition Act, 2002. It “prohibits any enterprise or association of enterprises or person or association of persons to enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India”. Any such agreement entered would be otherwise void.

First thing that needs to be discussed here is what exactly is an agreement. The term “agreement” has been defined under Section 2(b) of the act, which states that “agreement includes any arrangement or understanding or action in concert whether or not formal or in writing and it need not be enforceable by legal proceedings”. This definition of agreement has been given in a broader sense of meaning.

The second term that attracts our attention is what do we mean by “enterprise” and “person” since the sub-section (1) of Section 3 prohibits anti-competitive agreements entered into between them. Enterprise and person are defined under Section 2(h)1 and Section 2(l)2 of the act respectively.

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1 Section 2(h) Enterprise means a person or a department of the Government, which is, has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

2 Section 2(l) Person includes (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956); (vii) any body corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to co-operative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses
The concept of ‘enterprise’ was discussed upon in the case of CLAT Committee\(^3\), wherein it was held that “opposite party is a body constituted through a Memorandum of Understanding (MoU) between 14 participating National Law Universities (NLUs) for conducting admission test, MoU stipulates that the NLUs shall conduct CLAT and also handle the counseling for the law programmes on a rotational basis each year”. Thus, MoU was merely an ‘agreement’ and cannot be said to be an enterprise under Section 2(h) of the act because for an entity to be an enterprise, the following conditions have to fulfilled: (i) “it must be a person or department of the Government; (ii) it must be engaged in the specified economic activities; and (iii) such activity must not be a sovereign activity”.

Moving on with the interpretation of the term “anti-competitive agreement", as discussed above, the said agreement “causes or is likely to cause an appreciable adverse effect on competition” (“AAEC”). The focus now comes what we mean by appreciable adverse effect on competition and how do we know if an agreement is “causing or is likely to cause appreciable adverse effect on competition”. Section 19(3) provides that Competition Commission of India shall consider the following factors while determining whether an agreement is causing an appreciable adverse effect on competition under section 3:

(a) “creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services; or

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services”.

As we can see, clauses (a), (b), (c) are negative factors while clauses (d), (e) and (f) focus on the positive aspect.

**Horizontal Agreements:**

Section 3(3) provides that “any agreement shall be presumed to have appreciable adverse effect on competition, if there is an agreement entered into between enterprises or associations of enterprises or persons or associations of persons or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services”, which—

(a) “directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding (effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding)

The proviso to the section provides that “nothing shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services”.

This phrase ‘shall be presumed’ means it is per se rule. ‘Per se’ is a Latin expression, which implies that the courts will consider a particular activity to be harmful and there is no need to prove the nature of per se violations. This means that the burden of proof is on the accused and it is presumed that such an agreement leads to an AAEC. The rule “shall be presumed” has been given in the Evidence Act, 1872 which states that “whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved”.4

Cartels are dealt under Section 3(3). Cartels are horizontal agreements (arrangements between enterprises at the same stage of the production chain) defined under Section 2(c) as “including an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”. Cartels have a harmful effect on the competition in the market.

In Builders Association of India v. Cement Manufacturers’ Association & Ors. 5, CCI held that the “Cement Manufacturers Association (CMA) was the platform used for cartelisation to fix cement prices as well as limit and control production and supply of cement in the market. CMA was used as a platform to exchange information relating to cost, capacities prices and production by the opposite parties. It also observed cement manufacturers simultaneously increased cement prices just after association meetings; Capacity utilisation (total capacity achieved) and production were reduced in a coordinated manner and not according to the market forces. A similar pattern of dispatch was observed among the cement manufacturers during November 2010; Cement manufacturers earned super-normal profits or abnormal profits”. The CCI also noted that “the concentration levels of the cement market signify the oligopolistic nature of the market, which in fact facilitated collusion”. CCI, thus, concluded that the parties had formed a cartel, thereby; contravening the provisions of the Act and CCI imposed a penalty of Rs. 6000 crores on the said cement producers. This was a landmark decision of CCI

In Rajasthan Cylinders and Containers Ltd. v Union of India6, the Supreme Court held that, “despite identical prices by bidders and a contemporaneous trade association meeting, there was no collusive bidding”. Parallel pricing was as a result of oligopsony in the market and not due to collusion. In the present case, the appellants were suppliers of LPG cylinders were found to be “engaged in bid rigging due to quoting near identical prices in tender”. The Supreme Court held

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4 Section 4, Indian Evidence Act 1872
5 Case No. 29 of 2010
6 (2018) PL (Comp. L) December 82.
that “the market condition led to a situation of oligopsony that prevailed because of limited buyers and influence of buyers in fixation of prices was all prevalent and price parallel behaviour was not a result of concerted practice”.

**Vertical Agreements:**

Vertical Agreements are agreements between enterprises at different levels of the production chain, like an arrangement between the manufacturer and a distributor. It is dealt under Section 3(4) of the act. The section 3(4) states that “any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of or trade in goods or provision of services shall be an anti-competitive agreement if such agreement causes or is likely to cause an appreciable adverse effect on competition in India” and it includes—

(a) **Tie-in Arrangement** - includes “any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods”.

In the case of **Sonam Sharma v. Apple & Ors.** CCI said that the following ingredient needs to be present to establish tying arrangement:

i. “There must be two products that the seller can tie together. Further, there must be a sale or an agreement to sell one product or service on the condition that the buyer purchases the other product or service. In other words, the requirement is that purchase of a commodity is conditioned upon the purchase of another commodity”.

ii. “The seller must have sufficient market power with respect to the tying product to appreciably restrain free competition in the market for the tied product. That is, the seller has to have such power in the market for the tying product that it can force the buyer to purchase the tied product”; and

iii. “The tying arrangement must affect a “not insubstantial” amount of commerce. Tying arrangements are generally not perceived as being anti-competitive when substantial portion of market is not affected.”

(b) **Exclusive Supply Agreement** - includes “any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person”; 

(c) **Exclusive Distribution Agreement** - includes “any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods”; 

(d) **Refusal to Deal** - includes “any agreement, which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought”; 

(e) **Resale Price Maintenance** - includes “any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by
the seller unless it is clearly stated that prices lower than those prices may be charged”.

To understand the concept better, we will take up some cases:

In the case of Shamsher Kataria v. Honda Siel Cars India Ltd. and other⁸, the Competition Commission of India, deliberated upon the concepts of exclusive supply agreements, exclusive distribution agreements and refusal to deal.

The facts of the case are that there were allegations that the opposite parties (OPs) had engaged in anti-competitive practices by restricting the free availability of the genuine spare parts of automobiles in the market and the original equipment manufacturers had clauses in their agreements requiring the authorised dealers to buy spare parts only from them and their authorized vendors only. The commission received information against original equipment manufacturer (OEM) for entering into agreements with original equipment suppliers (OES) and authorised dealers, “restricting free availability of auto spare parts in the market, indulging in similar restrictive trade practices with respect to after sales service, procurement and sale of spare parts from the Original Equipment Suppliers”. The CCI held that “the opposite parties, either specifically through their agreements or otherwise through understanding with their dealers, required them to source spare parts only from them or their approved vendors. Hence, these agreements were found to be in the nature of exclusive supply agreements in terms of Section 3(4)(b) of the Act”.

In Re: Fx Enterprise Solutions India Pvt. Ltd. And Hyundai Motor India Limited.⁹ the commission held that “by fixing the maximum resale price as well as the maximum amount of discount that can be granted to customers, the party has been effectively found to have fixed the minimum resale price. Commission’ held that ‘Hyundai Motor’ has contravened the provisions of Section 3(4)(e) read with Section 3(1) of the Act, 2002 through arrangements which resulted into Resale Price Maintenance”. The Commission also held that the party has contravened the provisions of Section 3(4)(a) read with Section 3(1) of the Act, 2002 by making it mandatory for its dealers to use the lubricants/oils that they recommended otherwise they would face penalty for using any other lubricant/oil. However, this decision was set aside by National Company Law Appellate Tribunal (NCLAT)¹⁰ mainly claiming the CCI relied upon the report of the Director General alone without conducting an inquiry under Section 27 of the Competition Act, 2002 based on appreciation of relevant evidence. Also, it observed CCI failed to take into consideration the factors mentioned under Section 19(6) and 19(7) of the Competition Act for the determination of the relevant geographic market and product market, respectively.

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⁸ Case No. 03/2011
⁹ Case No. 36 of 2014
¹⁰ Competition Appeal (AT) No. 06 of 2017
In Director General (Supplies & Disposals), Department of Commerce, Ministry of Commerce & Industry, Government of India, New Delhi v. M/s Puja Enterprises and Others\textsuperscript{11}, there was a reference filed by Director General (Supplies & Disposals), Directorate General of Supplies & Disposals (DG S&D), Department of Commerce, Ministry of Commerce & Industry, Government of India, New Delhi under section 19(1)(b) of the Competition Act, 2002 against the opposite parties with allegations of bid rigging and allocation of market in contravention of section 3 of the Act. The Commission held that the “opposite party bidders by quoting identical/ near identical rates had, indirectly determined prices/ rates in the Rate Contracts finalized by DG S&D and indulged in bid rigging/ collusive bidding in contravention of the provisions of section 3(1) read with section 3(3)(a) and 3(3)(d) of the Act. Further, the opposite parties by imposing quantity restrictions had controlled/ tried to limit the supply of the product and also shared the market amongst themselves via an agreement and through bid rigging, thereby, contravening the provisions of section 3(1) read with sections 3(3)(b), (c) and (d) of the Act. The Commission observed that the opposite parties being not at different stages or levels of the production chain in different markets as required for invoking the provisions of section 3(4) of the Act, thus section 3(4) not attracted”.

Section 3(5) provides for a “very limited exemption which states that the provisions with respect to anticompetitive agreement (section 3) will not apply to the right of any person to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under the Intellectual property rights like copyright, patent, trademark, geographical indicators, industrial designs and semi-conductor integrated circuits layout designs”. Nothing in section 3 would restrain an IPR holder from imposing reasonable conditions as may be necessary for protecting his intellectual property rights. Thus, by implication, unreasonable conditions that are part of IPR will attract Section 3.

CCI has provided a list of practices/agreements that may contravene Section 3 of the act, even though they have been entered into for protection of IPR:\textsuperscript{12}

1. “Patent pooling”- may be a restrictive practice if pooling firms decide not to grant license to third parties;
2. Tie-in arrangement– If under the tying arrangement, licensee is required to acquire particular goods solely from the patentee then it may be a restrictive practice;
3. Perpetual Royalty- Agreement to continue payment of royalty even after the patent has expired;
4. Restricting R&D- Clause restricting competition in R & D; or prohibiting licensee to use rival technology
5. Not to challenge the validity of IPR- Licensee may be subjected to a condition not to challenge the validity of IPR in question.
6. Grant Backs: Under this a licensee may require to grant back to the licensor any know-how of IPR

\textsuperscript{11} Ref. Case No. 01 of 2012

\textsuperscript{12} Competition Commission of India; Advocacy Booklet on Intellectual Property Rights under the Competition Act, 2002
acquired and not to grant licenses to anyone else.

7. **Resale Price Fixation:** Licensor fixes the price at which the licensee should sell.

8. **Territorial Restrictions:** The licensee may be restricted territorially or according to categories of consumers.

9. **Package Licensing:** The licensee may be coerced to take several licences, even though he may not need all of them.

10. **Excessive Quality Control:** It implies imposing quality controls on the licensed product beyond what is necessary.

11. **Field of Use Restriction:** It is restricting the right of licensee to sell the product to persons other than those designated by the licensor.

12. **Imposing a Trademark:** It could restrict the licensee’s freedom to select a trade mark.

13. **Indemnity for IP Infringement:** It refers to the indemnification of the licensor to meet expenses in an IP infringement proceedings.

14. **Undue Restriction:** Undue restriction on licensee’s business could be anticompetitive.

15. **Limiting Output:** Limiting the maximum amount of use the licensee may make of the patented invention may affect competition.

16. **Recruitment Restrictions:** Condition imposed on the licensee to employ or use staff designated by the licensor.

In *Entertainment Network (India) Limited v. Super Cassette Industries Ltd*, the Supreme Court reiterated on the issue related to conflict between the Competition Law and Intellectual Property Rights. The court observes “that even though the copyright holder has full monopoly but the same is limited in the sense that if such monopoly creates disturbance in smooth functioning of the market will be in violation of competition law and same was in relation to refusal of license. Undoubtedly, IPR owners can enjoy the fruits of their labour via royalty by issuing licenses but the same is not absolute”.

**INQUIRY BY CCI:**

Section 19 (1) of the act provides that “CCI may enquire into any alleged contravention of section 3(1) of the Act suo motu or on receipt of any information from any person, consumer or their association. It can also act upon reference made by the central or state government or any statutory authority”. CCI will proceed with the enquiry only when there exists a prima facie case and then it would direct the director general to carry out the investigation further. If after enquiry CCI finds that the agreement is anti-competitive and has appreciable adverse effect on the competition then, it can pass the following order (apart from any interim orders under section 33 of the Act):

a. “Direct the parties to discontinue and not to re-enter such agreement (cease and desist);

b. Impose such penalty as it may deem fit which shall not be more than 10% of the average of the turnover for the last three preceding financial years upon each of the party;

c. In case of a cartel, each producer, seller, distributor, trader or service provider included in that cartel can be imposed a penalty up to three times of
its profit for each year of the continuance of such agreement or 10% of its turnover for each such year, whichever is higher;
d. Direct to modify the agreement and in the manner as may be specified in the order of the CCI;
e. Pass any such order or issue such directions as it may deem fit.”

CONCLUSION:
The Competition Act 2002 aims to prohibit practices that have appreciable adverse effect on competition within India so as to ensure freedom of trade and protect the interests of all the parties including consumers. It is well recognized that the level of consumer awareness is a real indicator of the nation’s growth and progressiveness of the society. In light of this, Section 3 of the Act prohibits anti-competitive agreements, which are harmful to the buyers and the cause appreciable adverse effect on competition in market. Thus, it is important that the parties doing business in India ensure that there is no anti-competitive element in the agreements between them.

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